IN THE UNITED STATES DISTRICT COURT
EASTERM DISTRICT OF TEXAS
MARSHALL DIVISION

MARK T. EDDINGSTON,	'	
JEFFERY M. DAVIS	'	
ELRIDGE NICHOLAS BOLLICH	'	
and RAY A. COX	'	
	'	
Plaintiff	'	
	'	
V.	'	**C.A. NO. 2:12 –CV--00422**
	'	
UBS FINANCIAL SERVICES, INC.	'	
	'	
Defendant	'	

PLAINTIFFS' MOTION TO STRIKE
TESTIMONY FROM DEFENDANT'S EXPERTS
BASED ON LATE-PRODUCED DOCUMENTS OR, IN THE
ALTERNATIVE, PERMITTING PLAINTIFFS TO DESIGNATE REBUTTAL
EXPERTS AND PARTIALLY CONTINUING CERTIFICATION HEARING

Plaintiffs move for an order striking Defendant's designated experts as witnesses at the certification hearing in this action set for June 4, 2013, or in the alternative, permitting Plaintiffs to designate rebuttal experts and partially continuing the certification hearing to allow testimony by rebuttal experts, and would show as follows:

I. INTRODUCTION

Pursuant to this Court's February 4, 2013 Docket Control Order relating to the issue of class certification of this action, Defendant, on May 13, 2013, designated as experts Laura E. Simmons, Ph.D. and Alan M. Johnson and provided reports from them. The report of Ms. Simmons identifies and analyzes certain different types of distributions under Defendant's PartnerPlus Plan. The report of Mr. Johnson addresses whether Defendant's PartnerPlus Plan was a deferred compensation plan similar to that of competitors. While neither identifies the conclusions it reaches as bearing on any issue under the Employee Retirement Income Security Act ("ERISA"), Defendant asserts that such reports bear on the applicability of ERISA to the PartnerPlus Plan, which is an ultimate merits question of fact and law.

II. VIOLATION OF FEDERAL RULES: FAILURE TO DISCLOSE SUPPORTING DATA

The expert reports purport to be based on "substantial data." Ms. Simmons' report identifies 36 documents, including substantial digital financial data not available to Plaintiffs. Mr. Johnson's report identifies 115 separate documents. None of the identified supporting data was provided to Plaintiffs, although they were necessarily provided to the experts days or weeks prior to the reports. Defendant ignored its continuing obligation under Rule 26(a)(1)(A) to provide such supporting data to Plaintiffs as soon as its relevance became apparent. Defendant also ignored the more specific obligation under Rule 26(a)(2)(B)(ii) to provide such supporting data when it designated the experts and provided the reports. Finally, Defendant ignored its obligation under Rule 34 beginning March 20, 2013, when it responded to Plaintiffs' first request for production of documents from Defendant. Defendant requested, among other documents, any and all documents pertaining to the applicability of ERISA to the PartnerPlus.

Defendant did not provide the data underlying the reports until five days after the reports were submitted - on May 18, 2013.

The failure of Defendant to provide the supporting data provided to its experts in a timely manner is itself ample ground to strike the experts. Under Rule 26(a)(1)(A), Defendant has an ongoing obligation to provide "all documents, electronically stored information, and tangible things" that it "may use to support its claims or defenses." Under Rule 26(a)(2)(B)(ii), an expert report must be accompanied by underlying data.

Under Rule 34, Defendant has an obligation to produce responsive documents in connection with a response to a request for production of documents. Defendant's omissions in this case violate all three rules.

Under Federal Rule of Civil Procedure 37(c)(1), "if a party fails to provide information…required by Rule 26(a)…the party is not allowed to use that information or witness to supply evidence on a motion." As an additional sanction for violating these rules, Rule 37 explicitly contemplates "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence," and "striking pleadings in whole or in part." Fed. R. Civ. P. 37(c)(1)(C). Under these rules, Defendant's designated experts should be stricken for purposes of the certification hearing.

III. ALTERNATIVE REQUEST: PERMIT FULL EXPERT DISCOVERY

If the Court permits Defendant's designated experts to testify at the certification hearing, it should nevertheless permit Plaintiffs to designate a rebuttal expert and continue the certification hearing to allow testimony by such rebuttal expert or experts. Because the financial data underlying the report of Ms. Simmons was in the sole possession of Defendant, and the data underlying the report of both Ms. Simmons and Mr. Johnson was not timely produced to Plaintiff, Plaintiff could not, when it was required to designate an expert on April 22, 2013, have obtained any expert on the issues addressed by Ms. Simmons and Mr. Johnson, and will be severely prejudiced if it is not allowed to offer rebuttal expert testimony. Plaintiffs do not wish to delay the certification hearing, but solely to permit it to be partially continued as necessary beyond June 4, 2013 and supplemented by rebuttal expert testimony obtained by them.

WHEREFORE, Plaintiffs pray for an order striking Defendant's experts as witnesses at the class certification hearing in this action, or in the alternative, permitting Plaintiffs to designate rebuttal experts and partially continue the class certification hearing to permit supplementary testimony by such rebuttal experts.

Respectfully submitted,

/s/ *Robert E. Goodman, Jr.*
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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

On May 21st, 2013 I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Eastern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or *pro se* parties of record electronically or by another manner authorized by Federal rule of Civil Procedure 5(b)(2).

_____/s/ *Robert E. Goodman, Jr*_
Robert E. Goodman, Jr.

CERTIFICATE OF CONFERENCE

Lead and local counsel for Plaintiffs conferred with lead and local counsel for Defendant regarding the substance of this Motion. Counsel for Defendant indicated that they oppose the instant motion.

_____/s/ *Robert E. Goodman, Jr*_
Robert E. Goodman, Jr.